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Reasonably Accommodating the Able Employee Who is Disabled by Misperception: The ADA's "Regarded As" Prong Gone Awry?

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REASONABLY ACCOMMODATING THE ABLE EMPLOYEE WHO IS DISABLED BY MISPERCEPTION: THE ADA'S "REGARDED AS" PRONG GONE AWRY?

*Selma Shelton**

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I. INTRODUCTION

The tragic consequences of myths, misunderstandings, misinformation, miscommunication, and misperceptions have been well documented in American history. With each evil, the government was responsible for perpetuating and then eventually quelling the evil. In 1857, for example, the Supreme Court decided *Dred Scott v. Sanford*,¹ ruling that people of African descent could never be citizens of the

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1. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

United States, thereby relegating them to status of mere property.² Congress and the States later rectified this egregious error by amending the Constitution.³ This landmark case epitomizes the inevitable result inequity and inequality when a society is pervaded with attitudes based on stereotypes, misunderstanding, and ignorance. Though the evil of race-based slavery was remedied, this did not mark the death of shame in America. The subjugation of another minority persisted, as individuals with disabilities remained without legal recourse. Congress recognized “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services” and, in response, enacted the American with Disabilities Act (“ADA”).⁴

This paper discusses a problem that persists despite the enactment of the ADA – victimization of individuals with disabilities because of strongly ingrained attitudes, fears, and stereotypes. Part I defines the ADA generally and focuses on the statutory provision most relevant in this paper, the definition of “disability” with respect to an individual. More specifically, this paper explores the “regarded as” prong of the definition and explains the three rationales an individual may use to qualify as “disabled” to bring suit under the “regarded as” prong. Part II discusses the semantics of “reasonable accommodation.” This section explores reasonable accommodations for persons who are perceived as disabled, analyzing the inquiry principally through the lens of the circuits that have ruled on the issue. Finally, Part III discusses misperception of disability and whether it results in discrimination adequate to justify reasonable accommodations. Furthermore, this section explores and discusses whether the inquiry about accommodation should change depending on the rationale the plaintiff puts forth for his/her qualification in regard to coverage under the “regarded as” prong of the ADA. Ultimately, this paper argues and concludes that individuals who are erroneously believed to be disabled should be accommodated commensurate with the nature and extent of the employer’s belief and the actual state of the person’s impairment or non-impairment. To effectuate such a course, this paper recommends that Congress amend the ADA to provide an appropriate remedial scheme for individuals who are “regarded as” disabled and who suffer

2. *Id.* at 395.

3. See U.S. CONST. amend. XIII (freeing slaves) and U.S. CONST. amend. XIV (providing a broad definition of citizenship and according equal protection to all citizens).

4. American with Disabilities Act, 42 U.S.C. § 12101 (3) (2000).

in their employment conditions as a result of their employers' misperceptions.

II. THE ADA AND ITS "REGARDED AS" PRONG

Title I of the ADA provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, . . . hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."⁵ In relevant part, the ADA defines a person with a disability as an individual who has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" or who is "regarded as having such an impairment."⁶

The Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcing Title I of the ADA, has issued regulations offering interpretive guidance to define disability, including guidance on general provisions that are outside the purview of explicit EEOC authority.⁷ These regulations provide that "regarded as having such impairment" means:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined [under physical or mental impairments] but is treated by a covered entity as having a substantially limiting impairment.⁸

These three rationales for bringing suit under the "regarded as" prong are discussed below.

A. *Actual Impairment Treated as Substantially Limiting a Major Life Activity*

Most cases that are brought under the "regarded as" prong assert that the individual has an actual impairment, which, though not

5. 42 U.S.C. § 12112 (2000).

6. 42 U.S.C. § 12102 (2) (2000).

7. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (noting that "no agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . which fall outside Titles I-V").

8. 29 C.F.R. § 1630.2 (1) (1)-(3) (2001).

substantially limiting, is treated as such by the employer. The prevalence of this rationale in “regarded as” suits indicates that employers are more likely to have false perceptions about a condition that is conspicuously present or one about which it has been notified – an actual impairment – than one which is hidden or of which it has no knowledge.

In *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, the employer appealed a partial summary judgment granted to the EEOC on a suit brought on behalf of an employee who worked as a lab operator in the company’s chemical plant.⁹ The employee was diagnosed with multiple medical conditions that made it increasingly difficult for her to walk but for which she received treatment.¹⁰ The employee received annual physical examinations from the company’s plant physicians who eventually restricted her from “standing for more than ten minutes, walking more than one hundred feet without resting, working in a stooped position, or working more than eight hours.”¹¹ A year after the company’s physicians restricted her in this manner, the company transferred the employee to the sedentary position of lab clerk.¹² The company’s physicians eventually became concerned about the employee’s ability to walk safely at the plant and to evacuate safely in an emergency.¹³ After conducting a Functional Capacity Evaluation (“FCE”) of the employee, the results of the FCE confirmed her walking impairment and the company’s physicians restricted her from walking anywhere in the plant.¹⁴ The employee attempted to be reinstated, but the company refused even though the employee demonstrated that she could walk the evacuation route without assistance.¹⁵ The district court found that the employer regarded the employee as disabled under the ADA because it perceived her as substantially limited in the major life activity of walking.¹⁶ The Fifth Circuit agreed that the company did indeed regard the employee as disabled within the meaning of the ADA because, as the district court found, the company placed broad restrictions on the employee because of its perceptions that she was “incapable of walking” and “permanently disabled from walk-

9. *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 727 (5th Cir. 2007).

10. *Id.* at 727.

11. *Id.* at 728.

12. *Id.*

13. *Id.*

14. *Id.* (discussing how this company-imposed immobility left the employee unable to evacuate the plant in an emergency, and the company, contending that ability to evacuate was required of all employees, placed the employee on permanent disability).

15. *Id.*

16. *Id.* at 729.

ing."¹⁷ Furthermore, the appellate court relied on the lower court's finding that the company considered her "substantially impaired in walking" because the company thought she "could not dependably be counted on to walk safely."¹⁸

In *LeVelle v. Penske Logistics*, a terminated employee sued his employer alleging that he was discharged after the company learned he was subject to, and working under, doctor-recommended lifting restrictions.¹⁹ The company official testified to the jury that she was concerned that if a driver who had already suffered an on-the-job injury returned to work, he could re-injure himself.²⁰ When the employee was informed he could not work as a driver because of his medical restrictions, the employee allegedly asked if he could work at the company in some other capacity.²¹ At trial, the company official testified that she did not consider any alternative to termination of the employee.²² The letter that informed the employee of his termination stated, "[d]ue to no work being available at this time, you are terminated effective immediately."²³ A jury found that the employer regarded the employee as disabled.²⁴ The appellate court found that evidence in the record supported the verdict, since there were reasonable inferences suggesting the company viewed him as unable to perform a broad range of jobs and especially since a company official had testified that she did not consider the employee for any other position because of his restrictions.²⁵ The court also noted that the evidence permitted the conclusion that the company's actions were motivated by "myths, fears, or stereotypes" about the employee's perceived disability instead of his actual ability to work.²⁶

In *Capobianco v. City of New York*, a discharged sanitation worker brought suit against the city and sanitation department alleging, *inter alia*, that he was "regarded as" disabled because the city perceived him as substantially limited in the major life activity of seeing.²⁷ The plaintiff, who performed driving and garbage collecting functions, was diagnosed with night blindness, and despite having no

17. *Id.*

18. *Id.*

19. *LeVelle v. Penske Logistics*, 197 Fed. Appx. 729, 731 (10th Cir. 2006).

20. *Id.* at 732.

21. *Id.* at 732-33.

22. *Id.* at 733.

23. *Id.*

24. *Id.* at 734.

25. *Id.* at 735.

26. *Id.* at 736.

27. *Capobianco v. City of New York*, 422 F.3d 47 (2d Cir. 2005).

ocular hindrances to driving in the daytime, the department confined him to clerical duties during daylight work hours.²⁸ The Second Circuit disagreed with the district court's holding that the employee had not presented adequate evidence for a reasonable jury to find he was "regarded as" disabled.²⁹ The appellate court found there was substantial evidence in the record showing that the department regarded the employee as disabled,³⁰ including that the company placed the employee in position not to drive at all instead of restricting him from night driving.³¹ Additionally, the department permitted the employee to perform only clerical-type duties for two months even though he was capable of performing all sanitation worker duties during the day.³² A supervisor refused to evaluate him for two performance periods because the supervisor considered him to be "unrateable" even though he was subsequently rated by a different supervisor for performing satisfactorily.³³ In addition, the Personnel Management division recommended he be terminated because it believed he was "unable to perform in title duties of a sanitation worker due to Myopic Macular Degeneration" even though he did not even have this particular condition.³⁴ The appellate court held that a jury could reasonably find the department perceived the employee as having a "degenerating impairment that prevented him from much more than merely driving at night, and that [the department of sanitation] believed [the employee's] condition substantially limited his ability to see as compared to the average person in the general population."³⁵

In all three cases, "society's accumulated myths and fears about disability and disease [we]re as handicapping as [we]re the physical limitations that flow[ed] from an actual impairment."³⁶ In *Du Pont de Nemours*, the employee had a physical impairment that was well documented medically.³⁷ However, it was not so substantially limiting that it affected her walking capability in every facet of life.³⁸ The company, however, misperceived the impairment as having such a limiting effect

28. *Id.* at 51-53.

29. *Id.* at 60.

30. *Id.* at 58.

31. *Id.* at 60.

32. *Id.* at 51.

33. *Id.* at 52.

34. *Id.* at 60.

35. *Id.*

36. *See Sutton*, 527 U.S. at 489 (quoting *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)).

37. *Du Pont de Nemours*, 480 F.3d at 727-28.

38. *Id.* at 728.

and it treated her accordingly.³⁹ In *LeVelle*, the employee had a limiting impairment but he was treated as if he had a substantially limiting impairment and was locked out of the employer's workforce as a result of this false perception.⁴⁰ In *Capobianco*, the department misconceived the nature of the employee's condition when they thought it was degenerating.⁴¹ The employer proceeded to treat an actual impairment as a substantially limiting impairment which was different from the impairment that the employee actually had, and reacted to the employee differently as a result of its own misinformed unofficial diagnosis.⁴²

These cases keenly show the adverse effects that misperception about disability can have on individuals and the unemployment rates of disabled individuals in our economy. The "regarded as" prong protects against adverse employment actions when an individual may be limited in some capacity but not to an extent that warrants his exclusion from the workforce. Suits like these, which acknowledge the breadth of the ADA's protection, serve to reinforce the importance of compliance with the ADA and also to deter future wrongful termination by employers. More importantly, victories for plaintiffs in "regarded as" suits will likely make employers think twice before they let their own preconceived notions about a particular impairment influence the employment decisions they make with respect to an employee who has such an impairment. Perhaps these victories will lead to better treatment of impaired individuals who are qualified to perform work, but who may be easily misidentified and mischaracterized as unable to function effectively in their respective workplaces.

B. Actual Impairment that Substantially Limits a Major Life Activity Only Because of Others' Attitudes

On some occasions, an individual's impairment may only have a substantially limiting effect on a major life activity because of the way the attitudes of others influence the person. "An impairment [of this nature] might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."⁴³

In *EEOC v. Heartway Corp.*, an employee with Hepatitis C who worked as a dietary aide and cook for a nursing home was terminated

39. *Id.*

40. *LeVelle*, 197 Fed. Appx. at 731-32.

41. *Capobianco*, 422 F.3d at 50-53.

42. *Id.* at 53.

43. *Arline*, 480 U.S. at 283.

from her position because the company learned of the employee's condition and an official told the employee, "you having Hepatitis C, you will not work in our kitchen."⁴⁴ During the EEOC's investigation of the employee's complaint, the same company official asked the EEOC investigator, "how would you like to eat food containing her blood, if she ever cut her finger"; the company official subsequently commented to the investigator that "if this got out to their clients they[] would have a mass exodus from their nursing home."⁴⁵ The EEOC filed suit on behalf of the employee alleging that the company terminated the employee because it regarded her as disabled.⁴⁶

The Court of Appeals for the Tenth Circuit affirmed the jury verdict and concluded there was sufficient evidentiary basis for a reasonable jury to find the company treated the employee's impairment "as significantly restricting her ability to perform either a class of jobs or a broad range of jobs in various classes."⁴⁷ The court pointed to comments made by the company official that reflected how the company viewed the employee as not only unable to perform the job in its kitchen, but also, that it thought it was unsafe or unsanitary for her to continue cooking food for its clientele.⁴⁸ Noting the disabling effects that misperception could have, the court pointed to the company official's "mass exodus" comment, which implied the employee might not be able to properly perform her job because of how others might react when they learned she had Hepatitis C.⁴⁹ To complete the inquiry as to whether the employee was "regarded as" being excluded from a broad range of jobs, and therefore substantially limited in the major life activity of working, the court considered the testimony of an EEOC economist who testified that "the tasks, education, and experience relevant to the job of dietary aide correspond to two job groups that, in her opinion, 'account for about 55 percent of all jobs in the service worker category' in the relevant geographic area."⁵⁰ As such, the court concluded that the employee was precluded from a broad range of jobs.⁵¹

In *Bryant v. Troy Auto Parts Warehouse, Inc.*, the plaintiff, a high school graduate who was six feet tall and who weighed more than

44. EEOC v. Heartway Corp., 466 F.3d. 1156, 1159 (10th Cir. 2006).

45. *Id.* at 1159-60.

46. *Id.* at 1160.

47. *Id.* at 1165.

48. *Id.*

49. *Id.* at 1166.

50. *Id.* at 1165.

51. *Id.* at 1162.

350 pounds, applied for a position with Troy Auto Parts.⁵² When he filled out the application, he indicated he was interested in a delivery position and was subsequently hired in what he believed to be a position as a delivery/stock worker.⁵³ Because the plaintiff was hired at someone's recommendation, the co-owners of Troy Auto Parts had never met him prior to his employment and they were both unaware of his physical stature.⁵⁴ Prior to their in-person meeting with the plaintiff, the owners allowed him to use any of their three delivery vehicles.⁵⁵ When one of the owners eventually met him, the owners restricted his use of certain vehicles because the co-owner, who met the plaintiff, believed he was too heavy to drive some of the cars.⁵⁶ The plaintiff subsequently made only few deliveries.⁵⁷ Early in his employment, one of the owners expressed concern about plaintiff's health – concerns that were not alleviated by plaintiff's mother's assurances to the owner that her son did not have a heart problem or high blood pressure.⁵⁸

In considering the employer's motion for summary judgment, the court discussed the plaintiff's allegation that the company regarded him as disabled.⁵⁹ The court stated that "while obesity itself may not rise to the level of a disability within the ADA, other factors may further limit an individual's life activities. One such factor is the perception of others."⁶⁰ The court noted "an individual who is disfigured in some way may not be limited in any of the major life activities, but an employer may discriminate against such an individual because of the negative reactions of others."⁶¹ The court proceeded to discuss how an individual might be "substantially impaired only because of the attitudes of others" and noted that the plaintiff was not trained for counter work even though another employee with less experience was given such training.⁶² Thus, the court concluded there were genuine

52. Bryant v. Troy Auto Parts Warehouse, Inc., No. IP 95-1654-C-D/F, 1997 WL 441288, at *1 (S.D. Ind. 1997).

53. *Id.*

54. *Id.*

55. *Id.* It is unclear whether plaintiff made use of all the vehicles early in his employment with the company, but he was permitted to do so.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at *3-6

60. *Id.* at *4.

61. *Id.*

62. *Id.* (inferring that the employer's proffered reasons for denying the training to plaintiff – that is, plaintiff was not hired for this position and that counter work requires very specific experience – were pretextual).

issues of material fact as to whether plaintiff was limited in his ability to . . . because of the company's perceptions and so it denied the employer's motion for summary judgment.⁶³

In *Bryant*, it was possible that because of bias against obese individuals, the employer limited the scope of the plaintiff's participation at work. Even though plaintiff's size was unrelated to his ability to function in this particular workplace, the employer's preconceived notions and attitudes may have served to substantially limit plaintiff in his duties. As such, even though the *Bryant* court did not specify that working would be the major life activity that was substantially limited, it implied that working would be the major life activity affected by attitudinal barriers that caused plaintiff to be limited in his job duties.⁶⁴ Furthermore, the court recognized that even though plaintiff's obese condition was not a physical impairment that was treated as substantially limiting, negative perceptions and attitudes could cause the condition to be substantially limiting in one or more major life activities.⁶⁵ Similarly, In *Heartway Corp.*, the employee had an impairment, Hepatitis C, which, by itself, had no impact on her ability to work effectively in her position.⁶⁶ However, because of the strong convictions of the company officials, the employee was viewed as unable to perform a wide range of jobs and she became substantially limited in her abilities by virtue of their attitudes.

These two cases are the types of "regarded as" suits that accentuate the importance of the second rationale for bringing a "regarded as" suit. If it was not possible to bring suit when an impairment was only substantially limiting because of the way others reacted to it, these two employees would have been without legal recourse, especially since the *Bryant* court specifically rejected the applicability of the first rationale (actual impairment not substantially limiting but treated as such) to that plaintiff's situation.⁶⁷

C. *Employee Has No Impairment but is Treated as Having a Substantially Limiting Impairment*

There are certain conditions that are particularly amenable to misperception that are not necessarily covered under the ADA as im-

63. *Id.* at *7.

64. *See id.* at *3-6.

65. *See id.* at *4.

66. *See* 466 F.3d. at 1159

67. *See id.* (noting that there is no evidence to suggest that the company limited plaintiff's duties because it perceived he had health problems).

pairments. Usually, these conditions are physically manifested and therefore susceptible to sensory discernment. For example, a person who is obese may not weigh enough to rise to the threshold level needed for ADA coverage but such an individual may be misconstrued as having limited capabilities or having substantial limitations in certain activities; or in the case of emotional responses, a person whose expression shows profound sadness may be perceived to be depressed even though that person does not have such a mental impairment. The third rationale of the "regarded as" prong covers situations where the employer erroneously believes non-impaired individuals are substantially impaired and then makes employment decisions based on its misperceptions.

In *Williams v. Cascade United Methodist Church*, the plaintiff, a Maintenance and Security Coordinator for the church, was required to perform and oversee custodial duties, including maintenance services.⁶⁸ After working for the church for over ten years, the plaintiff injured his right shoulder and neck while performing lawn maintenance on church grounds.⁶⁹ Post-surgery and initial disability ratings by doctors, the plaintiff was released to return to work without restriction.⁷⁰ There was uncertainty as to whether the plaintiff could return to work because of conflicting information the company received to this effect; however, the plaintiff insisted that he was capable of performing the duties.⁷¹ There was a dispute about whether the company requested the plaintiff to provide additional documentation that he was fit to return to work.⁷² The church eventually terminated him and solicited applications for a custodian position for which plaintiff did not apply.⁷³ The plaintiff filed suit alleging that the church regarded him as disabled even though he had no impairment⁷⁴ – a contention that lead the plaintiff to use the third prong (no impairment) instead of the first prong, wherein he ostensibly could have argued that he had neck and shoulder impairments which, though not substantially limiting, were treated as such.⁷⁵ The defendant church challenged this allegation even though it conceded that the plaintiff indicated he wanted to work and his treating physicians officially released him to return to

68. *Williams v. Cascade United Methodist Church*, No. CIV.A.1:00-CV3238TWT, 2002 WL 400805, at * 1 (N.D.Ga. Jan. 15, 2002).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at *1-2.

73. *Id.* at *2-3.

74. *Id.* at *4.

75. *See id.*

work.⁷⁶ The church claimed it requested plaintiff to provide additional documentation showing he was fit to return to work and the plaintiff's failure to do so justified his termination.⁷⁷ The district court refused to grant the employer's motion for summary judgment because both plaintiff and his doctors had affirmed his ability to return to work, but the defendant persisted in refusing to allow him to do so, thereby creating a genuine issue of material fact as to whether the church regarded plaintiff as having a substantially limiting impairment even though he had none.⁷⁸

In *EEOC v. Texas Bus Lines*, the EEOC filed suit on behalf of an obese job applicant, Arazella Manuel, alleging the company refused to hire her because it regarded her as disabled under the ADA.⁷⁹ After Manuel applied to the company for a bus driver position, she was interviewed, her references were checked, and she was administered a road test which she successfully passed.⁸⁰ Manuel then underwent a requisite physical examination, after which the doctor who examined her determined she was not qualified for the position because as a "morbidly obese woman, [she] would not be able to move swiftly in the event of an accident."⁸¹ Because the company conceded that Manuel would have been hired had it not been for the doctor's findings, the court closely scrutinized the basis for the company's or the doctor's findings.⁸² The court noted that the doctor's conclusion was not based on any medical tests or findings and his examination revealed no significant medical problems; on the contrary, the medical examination form stated Manuel was "normal" in all categories.⁸³ The court also found that the company was on notice that the doctor's findings, which disqualified the candidate for the position, were inconsistent with the Federal Motor Carrier Safety Regulations, which did not list impaired mobility as a per se disqualifying condition.⁸⁴ The court concluded the company decided not to hire Manuel because of a perception of disability based on "myth, fear, or stereotype" and the company regarded her as disabled and unable to work as a driver based on alleged impaired mobility – a perception due to "blind reliance" on a limited medical ex-

76. *Id.*

77. *Id.*

78. *Id.* at *5.

79. *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 975 (S.D. Tex. 1996).

80. *Id.* at 967.

81. *Id.*

82. *Id.* at 976.

83. *Id.* at 968.

84. *Id.*

amination.⁸⁵ The court held that the company perceived Manuel as an individual with a substantially limiting impairment even though he really did not have such an impairment. As such, Texas Bus Lines was liable under the "regarded as" prong of the ADA.⁸⁶

In *Williams*, because the plaintiff suffered from a previous injury, the employer, in fear of potential liability, terminated him.⁸⁷ In cases where the individual has no impairment but is regarded as having a substantially limiting one, the ADA is particularly useful because it prevents employers from acting on assumptions about individuals. Instead, it encourages employers to conduct the requisite review of individual's capabilities on a case-by-case basis. This implicit ADA mandate of analyzing employees' particular qualifications was emphasized in *Texas Bus Lines* because the company's failure to review the job applicant's actual qualifications when the employer judged her based on superficial and irrelevant characteristics was the principal reason it was held liable.⁸⁸ In both cases, the intent of the ADA's "regarded as" prong was effectuated because the courts held employment decisions based on irrational fears and preconceived prejudices to be impermissible.

III. THE SEMANTICS OF "REASONABLE ACCOMMODATION"

"The starting point for interpreting a statute is the language of the statute itself."⁸⁹ The ADA states, "the term 'reasonable accommodation' may include (A) making existing facilities . . . readily accessible to and usable by [disabled individuals]; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and *other similar accommodations* . . ."⁹⁰ The term "may" indicates that the enumerated reasonable accommodations are illustrative not exhaustive. The suggestion of "other similar accommodations" further emphasizes this point. Because Congressional intent may be discerned by application of traditional tools of statutory construction,⁹¹ analysis

85. *Id.* at 979.

86. *Id.*

87. *Williams*, 2002 WL 400805, at *2.

88. *See Texas Bus Lines*, 923 F. Supp. at 978-79.

89. *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

90. 42 U.S.C. § 12111 (9) (1990) (emphasis added).

91. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984).

of the provisions gives insight into Congress' intent. Congress, though cursorily defining "reasonable accommodation," did not separately define the terms "reasonable" and "accommodation."⁹² If it wanted to ascribe specific meanings to those terms, it would have done so. "When a [term] is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."⁹³ Congress' failure to include separate definitions suggests that those terms are generally understood in everyday application. According to Black's Law Dictionary, "reasonable" means "fair, proper, or moderate *under the circumstances*."⁹⁴ The term "accommodation" means "the act or an instance of making a change or provision for someone."⁹⁵ Reasonableness, therefore, depends on the particular situation and is a term of relative application and meaning.

The EEOC enforcement guidance provides that "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."⁹⁶ Further, the EEOC identifies three categories of reasonable accommodations: (1) "modifications or adjustments to a job application process . . ." (2) modifications or adjustments to the work environment, or to the matter or circumstances under which the position . . . is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position or (3) modifications or adjustments that enable [qualified disabled employees] to enjoy equal benefits . . . as other similarly situated employees without disabilities."⁹⁷

In understanding and applying the notion of a "reasonable accommodation" once the term's plain meaning has been discerned, analysis of its statutory context is mandated. The ADA states that it is discrimination when an employer does not "make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."⁹⁸ Because the ADA defines "disability" to include individuals with actual disabilities as well as perceived disabilities,⁹⁹ the question arises as to whether individuals perceived to be disabled should be reasonably accommodated. The

92. See 42 U.S.C. § 12111 (9) (1990).

93. *Smith v. United States*, 508 U.S. 223, 228 (1993).

94. BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis added).

95. *Id.*

96. 29 C.F.R. § 1630.2 (o) (1997).

97. 29 C.F.R. § 1630.2 (o) (1) (i-iii) (2000).

98. 42 U.S.C. § 12112 (b) (5) (2000).

99. 42 U.S.C. § 12102 (2) (1990).

plain language of the ADA does not distinguish between these two ways of qualifying as "disabled" when it states that a qualified disabled individual is entitled to reasonable accommodation. Perhaps because it seems counterintuitive to reasonably accommodate someone who is not actually disabled but merely perceived to be so, courts have been inconsistent in answering the question of when it is appropriate to order such reasonable accommodations for "regarded as" plaintiffs.

A. *The Circuit Split on Providing Reasonable Accommodations to "Regarded As" Plaintiffs*¹⁰⁰

"The plain language of the ADA's interlocking statutory definitions includes within the rubric of a 'qualified individual with a disability' protected by the ADA individuals (1) regarded as disabled but (2) who, with reasonable accommodation, can perform the essential functions of the position that they hold."¹⁰¹ In regard to the plain language interpretation, the First, Third, Tenth and Eleventh Circuits have determined that reasonable accommodations are available to individuals who are merely "regarded as" disabled.¹⁰² The Fifth, Sixth,

100. The discussion in this paper is focused on reasonable accommodations for "regarded as" plaintiffs when "essential functions" are at issue. The extent to which an employer might be required to provide reasonable accommodations for the non-essential functions the employee is asked to perform is beyond the scope of this paper. However, the author notes that the plain language of the ADA allows a possible reasonable accommodation for qualified individuals with disabilities to be the elimination of non-essential functions. See 42 U.S.C. § 12111(9)(B); *E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1284 (7th Cir. 1995) (discussing same). As such, the author speculates that courts that hold reasonable accommodations are available to "regarded as" plaintiffs will likewise hold that such reasonable accommodations are available when the "regarded as" plaintiff needs a reasonable accommodation for a non-essential function or when the reasonable accommodation can be job-restructuring in the form of elimination of the non-essential function.

101. *Kelly v. Metallics West, Inc.*, 410 F.3d 670, 675 (10th Cir. 2005).

102. See e.g., *Kelly*, 410 F.3d at 675; *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005); *Williams v. Philadelphia Housing Auth. Police Dep't*, 380 F.3d 751, 773-76 (3d Cir. 2004); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir.1996); See also Elizabeth Mills, *How Bizarre? The Application of Reasonable Accommodation To Employees "Regarded As" Disabled Under the ADA Does Not Necessarily Lead to Bizarre Results*, 75 Miss. L.J. 1063, 1074, 1083 (2006) (recognizing that "the main argument against reasonable accommodation for individuals 'regarded as' disabled was that Congress could not have intended to deny reasonable accommodation to an impaired individual that is not substantially limited in a major life activity while requiring the same individual to receive reasonable accommodation simply if their employers regarded their impairment as substantially limiting a major life activity" but arguing that the plain language and the legislative history of the ADA both support the interpretation that reasonable accommodations should be available to "regarded as" plaintiffs); Cynthia A. Crain, *The Struggle For Reasonable Accommodation For "Regarded As" Disabled Individuals*, 74 U. CIN. L. REV. 167, 189 (2005) (suggesting a judicial remedy to the conflict because "The

Eight and Ninth Circuits also ruled on the issue, but these Circuits adopted the view that reasonable accommodations to individuals who are merely “regarded as” disabled are anomalous.¹⁰³ The Second, Fourth, Seventh and DC Circuits have not directly addressed the issue at the appellate level,¹⁰⁴ and in some instances, there is an intra-circuit split.¹⁰⁵

United States Supreme Court has a duty to interpret the ADA as intended and provide full protection to all disabled individuals, whether their impairment arises out of physical, mental, or attitudinal barriers”). Cf. Jarad M. Lucan, *Applying The Americans With Disabilities Act: Why Giving Traditional Reasonable Accommodation to “Regarded As” Disabled Individuals Brings About “Bizarre Results,”* 25 QLR 417, 452 (2006) (concluding “that the ADA does not obligate employers to provide the same traditional reasonable accommodation to both actual and ‘regarded as’ disabled employees [and that] [t]here is no evidence the ADA’s ‘regarded as’ category was intended to bring a windfall to those employees whose statutorily defined disability fails to substantially limit a major life activity”).

103. See e.g., *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998). See also Allen Dudley, *Rights to Reasonable Accommodation Under the Americans With Disabilities Act For “Regarded As” Disabled Individuals*, 7 GEO. MASON L. REV. 389 (1999) (concluding “there is no evidence the ADA’s ‘regarded as’ prong was intended to benefit those persons who merely have an impairment that actually negatively impacted their ability to perform the job functions, yet are not substantially limited in a major life activity” without reconciling this statement with the ADA’s plain language’s amenability to a contrary interpretation); Jonathan D. Andrews, *Reconciling the Split: Affording Reasonable Accommodation To Employees “Regarded As” Disabled Under the ADA – An Exercise in Statutory Interpretation*, 110 PENN ST. L. REV. 977, 1001 (2001) (asserting that “regarded as” plaintiffs are not entitled to reasonable accommodations and stating that “Plain meaning and legislative history are inherently unreliable methods of statutory interpretation”). Cf. Matthew M. Cannon, *Mending A Monumental Mountain: Resolving Two Critical Circuit Splits Under The American With Disabilities Act For The Sake Of Logic, Unity, And The Mentally Disabled*, 2006 BYU L. REV. 529, 568 (2006) (advocating for “[t]he Supreme Court [to] resolve the circuit split . . . by recognizing an employer’s duty to reasonably accommodate individuals with perceived disabilities [because] such [a] holding represent[s] the most logical interpretation of the ADA . . .”).

104. See e.g. *Mack v. Strauss*, 134 F. Supp. 2d 103, 111 n.3 (D.D.C. 2001) (suggesting that it seems to be a “logical inconsistency” for a “regarded as” plaintiff to bring a failure to accommodate claim); *Betts v. Rector & Visitors of Univ. of Va.*, 145 Fed. Appx. 7, 15 (4th Cir. 2005) (unpublished) (noting that the district court suggested that the ADA’s reasonable accommodation requirement does not apply with equal force to regarded as plaintiffs but refusing to decide the issue while ruling that the university reasonably accommodated the plaintiffs’ perceived disability whether or not it was obliged to do so); *Green v. Pace Suburban Bus, No. 02 C 3031*, 2004 WL 1574246, at *11-12 (N.D. Ill. 2004) (recognizing that while “there is substantial authority that holds that Plaintiff’s ‘reasonable accommodation’ claim fails at the outset as a matter of law because Plaintiff only claims that he was ‘regarded as’ disabled,” other circuits have decided contrarily, but refusing to address the issue).

105. Compare *Shannon v. New York City Transit Auth.*, 332 F.3d 95, 105 n.3 (2d Cir. 2003) (noting that it is not clear that “a reasonable accommodation can ever be required in a ‘regarded as’ case”) with *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 161 (E.D.N.Y. 2002)

1. Reasonable Accommodations Should Be Provided to "Regarded As" Plaintiffs

When a plaintiff is deemed to be "regarded as" disabled within the meaning of the ADA and is not subsequently given a reasonable accommodation, a catch-22 tenet materializes whereby "[t]he employee whose limitations are perceived accurately gets to work, while [the employee regarded as disabled] is sent home unpaid."¹⁰⁶

In *Kelly v. Metallics West, Inc.*, the company appealed a judgment against it because they violated the ADA when it refused to permit an employee to return to work with supplemental oxygen.¹⁰⁷ On appeal, the company alleged, *inter alia*, that the ADA did not require it to reasonably accommodate the employee because, as per the district court finding, she was a "regarded as" disabled plaintiff.¹⁰⁸ It was undisputed that with supplemental oxygen, the employee was capable of performing the essential functions of her job.¹⁰⁹ The court held that based on the plain language of the ADA, the employer was required to reasonably accommodate a "regarded as" plaintiff.¹¹⁰ The court rejected the Ninth Circuit's concern that providing such accommodations would lead to "bizarre results."¹¹¹ According to the Tenth Circuit, "an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions."¹¹² The court rationalized that the dual purpose of encouraging employers to acquire knowledge about their employees' real capabilities while protecting employees who work for employers whose attitudes "remain mired in prejudice."¹¹³ The court believed the plain language of the ADA compelled the result it reached and that its holding was aligned with Congress' intent when it drafted the ADA.¹¹⁴

In *Williams v. Philadelphia Housing Authority Police Department*, the employee was unable to carry a firearm because of a mental

(holding that employees who are regarded as disabled are entitled to reasonable accommodations under the ADA).

106. See *Kelly*, 410 F.3d at 671 (quoting *Williams*, 380 F.3d at 775).

107. *Id.*

108. *Id.* at 671, 673.

109. *Id.* at 672.

110. *Id.* at 675-76.

111. See *id.* (citing *Kaplan*, 323 F.3d at 1231-33).

112. *Id.* at 675.

113. *Id.*

114. *Id.* at 676.

condition; his employer perceived him to be unable to carry a firearm and to be around others carrying firearms.¹¹⁵ The employee alleged that he was qualified to bring suit under the "regarded as" prong because his employer erroneously perceived him to be unable to work with, have access to, or be around others carrying, firearms.¹¹⁶ The employer argued that even if the employee was "regarded as" disabled because his impairment was perceived to be greater than it was, the employee was not entitled to accommodation under the ADA.¹¹⁷ While the court did not eliminate the possibility that in some instances reasonable accommodations for a "regarded as" employee may produce strange results, it declined to impose a barrier across the board for such claims because such a course would be in defiance of the plain language of the ADA.¹¹⁸ The court ultimately held that it was faithful to its interpretation of the ADA and that its choice to interpret the ADA as permitting reasonable accommodations for the "regarded as" plaintiff was justified.¹¹⁹

In *Katz v. City Metal Co., Inc.*, a scrap metal salesman brought suit after he was terminated following a heart attack.¹²⁰ Subsequent to the heart attack, the employee had difficulty walking, which was aggravated by cold weather.¹²¹ The appellate court held that there was a question as to whether the employee was actually disabled but that there was adequate evidence to support a "regarded as" disabled claim.¹²² When the case was in the lower court, the employee testified that following his surgery, he asked the company if he could return to work part-time, suggested a reduction in salary, and indicated he would accept whatever accommodation the company was willing to offer.¹²³ Because this was one of the early cases involving reasonable accommodations for a "regarded as" plaintiff, the circuit split had not yet fully developed. The court took for granted that "Congress, when it provided for perception to be the basis of disability status, probably had principally in mind the more usual case in which a plaintiff has a long-term medical condition of some kind, and the employer exaggerates its significance by failing to make a reasonable

115. *Williams*, 380 F.3d at 755.

116. *Id.* at 762.

117. *Id.* at 672-73.

118. *Id.* at 774.

119. *Id.*

120. *Katz*, 87 F.3d at 28.

121. *Id.* at 29.

122. *Id.* at 32-33.

123. *Id.* at 33.

accommodation."¹²⁴ The court held that "both the language and policy of the statute . . . offer protection [to someone who] is wrongly perceived to be [disabled]" even in the short term as in the *Katz* case.¹²⁵ Thus, the First Circuit assumed, without explicitly dealing with the issue, that the protection of reasonable accommodations for "regarded as" plaintiffs was available under the ADA.¹²⁶

In *D'Angelo v. ConAgra Foods, Inc.*, an employee, discharged from her position as product transporter, brought suit alleging, *inter alia*, that she was perceived as suffering from vertigo.¹²⁷ The appellate court reversed the district court's summary judgment on the issue because there were genuine issues of material fact as to whether the plaintiff was "regarded as" disabled and whether she could perform the essential functions of her job in spite of her vertigo condition.¹²⁸ Plaintiff alleged that she could have been reasonably accommodated if the company would have exempted her from working on the spreader belt and the box-former belt.¹²⁹ The court concluded the ADA's "plain language required employers to provide reasonable accommodations for employees they regard as disabled."¹³⁰ The court noted "in interpreting a statute, it is . . . axiomatic that [the] first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'"¹³¹ The court held the plain language of the ADA "yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense" and therefore, 'regarded as' plaintiffs are entitled to reasonable accommodations under the ADA.¹³²

2. Reasonable Accommodations Should Not Be Provided to "Regarded As" Plaintiffs

When the plain language of a statute would lead to an "absurd result," courts must delve beyond the literal interpretation.¹³³ Because

124. *Id.*

125. *Id.*

126. *See id.* at 31-33

127. *D'Angelo*, 422 F.3d at 1221-22.

128. *Id.* at 1222.

129. *Id.* at 1224.

130. *Id.*

131. *Id.* at 1235 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

132. *Id.* at 1235.

133. *See Kaplan*, 323 F.3d at 1226 (citing *Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001)).

the plain language meaning of the ADA is the principal rationale used by courts that interpret the ADA as permitting (and sometimes mandating) reasonable accommodations for "regarded as" plaintiffs, courts that hold contrarily reason that the absurdity of the results compel them to look beyond the ADA's plain meaning.¹³⁴

In *Kaplan v. City of North Las Vegas*, a peace officer was injured in a training exercise, and was thereafter unable to hold a gun or grasp objects with his right hand, was misdiagnosed as having rheumatoid arthritis.¹³⁵ The misdiagnosis led the City to believe the employee's injury was permanent and the City terminated him.¹³⁶ The discharged employee filed suit alleging the City terminated him because they regarded him as being permanently disabled by rheumatoid arthritis.¹³⁷ Because the employee alleged he was terminated based on a misdiagnosis, he sought relief under the theory that he was "regarded as" a disabled individual.¹³⁸ The court determined the plaintiff could not perform the essential functions of the job without reasonable accommodation; then it inquired as to whether a "regarded as" plaintiff was entitled to reasonable accommodations.¹³⁹ While recognizing that "on its face, the ADA's definition of 'qualified individual with a disability' does not differentiate between the three alternative prongs of the 'disability' definition," the court reasoned that "absence of a stated distinction . . . that is not tantamount to an explicit instruction," reasonable accommodations should be provided for "regarded as" plaintiffs.¹⁴⁰ Furthermore, the court noted that accommodating individuals who are not actually disabled would "compel employers to waste resources."¹⁴¹

Instead of focusing on the harm that is inflicted on employees who are misperceived as being disabled, the court considered the benefit that would be conferred on them even though they are not disabled.¹⁴² If reasonable accommodations are given, then impaired individuals "would be better off" if they are treated as "disabled" when their impairment does not meet the qualifying threshold for actual dis-

134. See, e.g., *id.* (quoting *Weber*, 186 F.3d at 917, for the proposition that reasonable accommodations for regarded as plaintiffs would lead to "bizarre" results).

135. *Id.* at 1227.

136. *Id.*

137. *Id.* at 1231.

138. *Id.*

139. *Id.*

140. *Id.* at 1232.

141. *Id.*

142. *Id.*

ability under the ADA.¹⁴³ The court neglected to reconcile this line of reasoning with the ADA's specific aim to eradicate discrimination against individuals whose impairments are not severe enough to be considered actual disabilities, but who are treated by their employers as having actual disabilities. In addition, the court did not contemplate the paradoxical consequence of its ruling – that is, the plaintiff who can work will not be reinstated, thus remaining without relief. Such consequences stemming from the court's judgment actually leads to the real "waste [of] resources" because here, a qualified individual is being excluded from the workforce because of his employer's biases.¹⁴⁴ In fact, this court's holding that the employer has no duty to accommodate an employee in a "regarded as" case,¹⁴⁵ serves only to perpetuate the evil the ADA attempted to extinguish with its "regarded as" prong.

In *Weber v. Strippit, Inc.*, an international sales manager who suffered from a major heart attack and related conditions was asked to relocate to another office of the employer.¹⁴⁶ He explained to the employer that his doctor instructed him not to relocate for six months because of his medical condition.¹⁴⁷ The employer refused to wait for six months to relocate the employee and either terminated him or he abandoned the job.¹⁴⁸ The district court granted judgment as a matter of law on the actual disability claim but reserved the perceived disability claim for a jury, which then returned a verdict for defendant.¹⁴⁹ On appeal, the employee claimed the district court failed to give the jury an instruction on reasonable accommodation for perceived disability.¹⁵⁰ The employee also claimed his employer was liable under the ADA when it failed to reasonably accommodate a perceived disability, a position the district court and the court of appeals both rejected.¹⁵¹ The appeals court reasoned that, "imposing liability on employers who fail to accommodate non-disabled employees who are simply "regarded as" disabled would lead to bizarre results."¹⁵² The *Weber* court then suggested a hypothetical to clarify its reasoning:

Assume, for instance, that Weber's heart condition prevented him from relocating to Akron but did not substantially limit any major

143. *Id.*

144. *Id.*

145. *Id.* at 1233.

146. *Weber*, 186 F.3d at 910.

147. *Id.*

148. *Id.*

149. *Id.* at 910.

150. *Id.* at 915.

151. *Id.* at 915-16.

152. *Id.* at 916.

life activity. *Absent a perceived disability*, defendants could terminate Weber without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive Weber's heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate Weber's condition by, for instance, delaying his relocation to Akron. *Although Weber's impairment is no more severe* in this example than in the first, Weber would now be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.¹⁵³

The *Weber* court successfully elicited the precise reason why the employer should have to accommodate the employee. In the first scenario, the employer could terminate the employee without liability if it has no misperceptions.¹⁵⁴ However, once those misperceptions are formulated (as in the latter part of the hypothetical), the employer would be held liable for failing to accommodate.¹⁵⁵ The distinguishing factor is the employer's belief in the existence of a disability the employee does not have.¹⁵⁶ Given that the ADA affirmatively protects those who are perceived as being disabled as well as those who are actually disabled, it is not a long stretch to base the distinction between employer liability and non-liability on that employer's perceptions or to categorize actions based on false perceptions as discriminatory. In fact, such a course parallels the way the ADA operates. An employee who has an impairment that does not rise to the level of an actual disability may still qualify to bring suit as a "disabled individual" solely because of the subjective belief of the employer who regards such employee as disabled. The impairment itself would be no more severe, but liability would be imposed on the employer because it acted based on its misperception.¹⁵⁷ As such, the *Weber* court's hypothetical is self-defeating.

In *Workman v. Frito-Lay, Inc.*, a discharged employee, who worked as a packer and a floor person, suffered from irritable bowel syndrome.¹⁵⁸ The employee filed suit following her termination alleging the company violated the ADA when it failed to accommodate her.¹⁵⁹ It was undisputed that the employee's irritable bowel syndrome was an impairment; but, the parties disagreed about whether it rose to the level of an actual disability by substantially limiting a ma-

153. *Id.* (emphasis added).

154. *See id.*

155. *See id.*

156. *See id.*

157. *See Weber*, 186 F.3d at 916.

158. *Workman*, 165 F.3d at 463.

159. *Id.*

for life activity and also whether the employer regarded the employee as being so limited.¹⁶⁰ The court held it would not be unreasonable for a jury to conclude that the employer discriminated against the employee by perceiving her to be disabled, and that the employer's contention of finding discrimination under this prong would obviate the employer's obligation to provide a reasonable accommodation was correct.¹⁶¹ The court did not give insight into its rationale for its choice not to mandate reasonable accommodations for "regarded as" plaintiffs. In fact, the court did not conduct any textual analysis of the ADA's plain language to determine what the proper course of action would be under the statute. As such, this court's holding that reasonable accommodations need not be provided for "regarded as" plaintiffs is on fragile grounds because the court did not review and analyze other courts' reasoning, nor did it seek refuge in the language of the statute for its unsupported opinion.

In *Newberry v. East Texas State University*, a terminated tenured professor brought suit against his employer claiming that he suffered from a psychiatric disability, which is a form of obsessive-compulsive personality disorder.¹⁶² Plaintiff alleged, *inter alia*, that he was perceived as disabled.¹⁶³ The plaintiff requested a reasonable accommodation of a year of paid sick leave so he could study art in New York, which is an accommodation that the employer refused to provide in the absence of a letter from plaintiff's psychiatrist stating he needed an accommodation.¹⁶⁴ The court found that the evidence suggested he was terminated for his work performance and lack of collegiality, and that under the facts, no reasonable jury could have found that he either did not suffer from a disability or that he was dismissed because of a perception he was disabled.¹⁶⁵ The court concluded that the plaintiff could only rely on the "regarded as" prong of the ADA and he would need to show the employer's erroneous perception was a motivating factor for his dismissal.¹⁶⁶ The court noted, "an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment."¹⁶⁷ The court looked

160. *Id.* at 467.

161. *Id.*

162. *Newberry*, 161 F.3d at 277-78.

163. *Id.* at 277.

164. *Id.* at 278.

165. *Id.* at 279.

166. *Id.*

167. *Id.* at 280.

only at the instant facts and applied the EEOC regulations discussing “regarded as” claims to those facts.¹⁶⁸ The court tried to determine which rationale would be most fitting for that particular plaintiff’s “regarded as” claim¹⁶⁹ but never considered the reasons why, or situations when a reasonable accommodation for “regarded as” plaintiffs may be permissible under the ADA. Even though the *Newberry* court made a sweeping and conclusive statement that employers need not provide reasonable accommodations to “regarded as” plaintiffs,¹⁷⁰ its analysis did not review or pertain to the language of the ADA. Its declaration that reasonable accommodations are not available to “regarded as” plaintiffs, cannot, therefore, be given much stock for it is not well-reasoned or justified.

IV. RECTIFYING THE DISABILITY OF MISPERCEPTION

“Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁷¹ The first question, therefore, is whether discrimination against individuals who are regarded as disabled is reasonably comparable to discrimination against actually disabled individuals. The answer is resoundingly in the affirmative based on plain reading of the ADA as well as judicial interpretation that has found “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”¹⁷² The second inquiry is whether the degree of comparability between actual and perceived disability warrants reasonable accommodations for individuals who are “regarded as” disabled. The answer turns on the comparison between actual disability and the specific rationale that applies in a “regarded as” case.¹⁷³

168. *Id.*

169. *Id.*

170. *Id.* at 277.

171. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

172. *Arline*, 480 U.S. at 284.

173. See Christopher J. Ring, *Disabling The Split: Should Reasonable Accommodations Be Provided To “Regarded As” Disabled Individuals Under The Americans With Disabilities Act (ADA)?*, 20 WASH. U. J.L. & POL’Y 311, 313 (2007) (suggesting “that a ‘regarded as’ disabled employee who has no actual impairment of any kind should not be entitled to reasonable accommodations. . . ., [whereas] a ‘regarded as’ employee who has an actual impairment, although not substantially limiting, should be entitled to the social accommodation of educating the workforce and others about the impairment, but should not be allowed any other accommodation.”).

A. *Reasonable Accommodations Should Be Provided Only for a Specific Subset of "Regarded As" Plaintiffs*

In a "regarded as" case brought under the first rationale - that is, the individual has an impairment that does not substantially limit one or more major life activities but which is perceived to be so - there is conceptual justification for providing an accommodation. The evil of discrimination against a disabled individual is similar to discrimination when the person is in fact impaired (even if not in a substantially limiting way) because in both instances, the person's condition *can* actually affect the person's ability to do the job in a particular way. For example, in the case of the employee who suffered from night blindness, which is a condition that does not qualify as an actual disability, the employer could have accommodated the employee by letting him drive only in the daytime.¹⁷⁴ The ADA mandates liability when the employer discriminates based on false perceptions.¹⁷⁵ Therefore, it is a natural extension to impose liability on an employer when it fails to accommodate the employee who is victimized by its discriminatory and unlawful actions. In interpreting the statute to mean that reasonable accommodations should be provided to impaired individuals who are "regarded as" being substantially limited in one or more major life activities, courts would stay within the language and spirit of the ADA without obtaining absurd results. This outlook would be especially useful when an impaired (but not disabled) employee is qualified to do a job only if provided with reasonable accommodations and such individual is "regarded as being" disabled. In effect, the employer would be accommodating someone it has already otherwise wronged; it would be making an alteration to diminish the negative effects of an impairment that it regards as constituting a disability. The law should treat an impairment that is "regarded as" being an actual disability as it would have treated an actual disability.

When a suit is brought under the second rationale whereby a non-substantially limiting impairment actually substantially limits one or more major life activities because of the attitudes of others, the employee would be able to perform his or her job duties were it not for the debilitating effects of the attitudes of others. In such an instance, the evil is not comparable to discrimination against an actually disabled person. This type of discrimination is more akin to race discrimination whereby the plaintiffs' fundamental problem is based

174. See *Capobianco*, 422 F.3d 47

175. See 42 U.S.C. § 12102 (2). See also *LeVelle*, 197 Fed. Appx. at 731-32.

on stereotypes about their abilities. Unlike the first rationale where the plaintiffs' impairments may call for an accommodation because the impairment can affect their abilities, the plaintiffs bringing suit under this second rationale, despite having impairments, are not hindered in any way in their capabilities absent the negative attitudes that exist about their impairments. As such, it makes less sense to mandate a reasonable accommodation. However, such a situation should not be remediless because the plaintiff is still being restricted because of negative stereotypes. One way to address such discrimination would be to award injunctive relief that eliminates the source of the attitudes based on stereotypes. For example, educating those who are misinformed about a particular condition would serve to eradicate irrational fears and would detoxify the work environment.

When a "regarded as" case is brought under the rationale that the individual has no impairment, but is perceived as having a substantially limiting one, it would lead to "bizarre" results if the non-impairment were reasonably accommodated. In fact, such a course is inherently unreasonable. For example, if an employee with a superficial scar on his face files suit because his employer took adverse employment action against him when it regarded him as being disabled, that individual is entitled to a remedy under the ADA for the plain discrimination claim if the employer regarded him as being substantially limited in a major life activity (which here, could be working since the employer may think the individual is unable to perform a broad class of jobs). However, such an individual should not be able to bring a failure to accommodate claim. Logically, if that person has no impairment, there is no reason to accommodate him or her and one would be hard-pressed to find an accommodation for an impairment that does not exist. To give practical application to the hypothetical, assume that an individual with a superficial scar applies for a position as a customer service representative at a bank and the employer believes that such individual is disabled because the apparent disfigurement will substantially limit him as he interacts with customers in any in-person customer service job. The person is, in fact, able to perform all the essential functions of the job and his superficial scar is not an impairment within the meaning of the ADA. Should the employer provide a reasonable accommodation for this employee? The answer is no because there is no impairment to accommodate. This employee can perform all the essential (and non-essential) functions of the position. Providing a reasonable accommodation in this situation defies common sense. It makes more sense for the employer to relin-

quish his false beliefs and curb any related discriminatory actions, both of which can be accomplished by some form of equitable relief.¹⁷⁶

The cases brought under prong two are analogous to cases brought under prong three because, in both situations, removing the attitudes that led to discriminatory actions will cure the problem. As such, cases brought under prongs two and three should be remedied the same way. Under prong two, as illustrated in the cases discussing this prong, the attitudes that lead to the impairment being substantially limiting could be those of persons outside of the covered entity's employ – "others" – but the employer would still have to subscribe to stereotypic attitudes and act in accord with them to be liable. Injunctive relief would address the employer's attitudes, which, once eliminated, would lead to no substantial limitation. In the same vein, prong three cases address discriminatory treatment taken by a "covered entity" because of its belief. The varied wording between prong two – which states "substantially limits . . . only as a result of *others*" – and prong three – which states "has none of the impairments . . . but is treated by a *covered entity* as having a substantially limiting [one]"¹⁷⁷ – is a distinction without a difference because, in both cases, quelling the employer's attitudes that led to the discrimination would provide adequate remedy for the problem. Even though attitudes under prong two may be pervasive in society (and not limited to the population within the workforce) and attitudes under prong three must be those of the employer, the employer in either situation, will only be liable if it acts discriminatorily since it regards the employee as disabled – irrespective of the stereotypes held by others in society generally.

Contrary to the various holdings circuits have taken, it is a mistake to strictly hold that reasonable accommodations should be provided or denied across the board. The ADA mandates a case-by-case analysis for almost every inquiry dealing with the ADA. This situation should be no different.¹⁷⁸ However, the alternative of having no

176. This is an appropriate situation for equitable relief because a legal remedy of monetary damages will be inadequate to realize the spirit of the ADA. Even if a plaintiff is compensated (with legal damages) for being regarded as disabled, the ADA aims to free workplaces (as a whole) of disability based discrimination, which, in this situation, can only be accomplished through equitable means.

177. 29 C.F.R. § 1630.2 (emphasis added). See also discussion *supra* Part I.

178. See Lawrence D. Rosenthal, *Reasonable Accommodations For Individuals Regarded As Having Disabilities Under The American With Disabilities Act? Why "No" Should Not Be The Answer*, 36 SETON HALL L. REV. 895, 969 (2006) (recommending a case-by-case approach which would "consider: (1) who is responsible for the employer's perception of the employee's 'disability'; (2) into which prong of the 'regarded as' definition the employee fits; (3) whether providing an accommodation in such a case would yield a bizarre result; and (4) the nature of the accommodation requested").

rules to guide employees and employers is equally unwelcome and unhelpful. Congress should amend the ADA to specify when a reasonable accommodation claim is cognizable and it should enact an appropriate remedial scheme for "regarded as" plaintiffs.

B. *Title I of the ADA Should Be Amended*

As it currently exists, the ADA's plain language covers discrimination when a qualified individual is treated differently because of a disability and when a qualified individual with a disability is denied a reasonable accommodation.¹⁷⁹ The courts have construed the ADA's provisions by recognizing two distinct types of claims: discrimination based on disability and failure to accommodate.¹⁸⁰ In amending Title I of the ADA by adding the following italic text to, and deleting the following stricken text from, the respective sections, Congress can clarify the breadth of the ADA's coverage.

§12112. Discrimination

(b) As used in this subsection (a) of this section, the term "discriminate" includes-

5 (A) not making reasonable accommodations to the known *actual or perceived* physical or mental *impairments* limitations of an otherwise qualified individual with a disability who is an applicant or employee, *unless the perceived impairment substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment or the perceived impairment is non-existent; notwithstanding this provision (5(A)), a covered entity is entitled to an affirmative defense when it fails to reasonably accommodate if such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or*

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the *actual or perceived* physical or mental impairments of the employee or applicant *unless the perceived impairment substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment or the perceived impairment is non-existent; or*

(C) *failing to implement measures to promptly correct adverse employment actions taken because the covered entity regards the individual as disabled if the perceived impairment is substantially limiting one or more major life activities only as a result of the*

179. 42 U.S.C. § 12102 (2000).

180. See, e.g., *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985); *Wernick v. Fed. Reserve Bank*, 91 F.3d 379 (2d Cir. 1996).

attitudes of others toward such impairment or the perceived impairment is non-existent but is treated by the covered entity as substantially limiting one or more major life activities.

V. CONCLUSION

"It is never too late to give up our prejudices," wrote Henry David Thoreau.¹⁸¹ The verity of this statement is the reason not all "regarded as" plaintiffs should be reasonably accommodated. Employers *can* give up their prejudices. Instead of fertilizing false perceptions by treating them as if they reflect reality, we should eradicate them from the workplace. However, values and fears that have been inculcated in individuals for many generations are harder to exterminate. When situations materialize where employers base employment decisions on preconceived notions that have no foundation in truth, there should be a penalty. This paper has suggested that Congress amend the ADA to ensure such a penalty for employers who conform to ignorance and myth. As argued in this comment, adhering to broad rules about reasonable accommodations for all "regarded as" plaintiffs is an ill-advised course. Instead, Congress should carve out malleable rules that courts can use as a guide in conducting case-by-case inquiries to determine when reasonable accommodations are appropriate for "regarded as" plaintiffs.

181. HENRY DAVID THOREAU, WALDEN 7 (Digireads.com Publ'g 2005).
